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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DANETTE D. LEE, Plaintiff and Appellant, v. RHIANNON POLLACK, Defendant and Respondent.	B172398 (Los Angeles County Super. Ct. No. BC 270621)

APPEAL from a judgment of the Superior Court of Los Angeles County. Aurelio Munoz, Judge. Affirmed.

Law Office of Robert M. Levy and Robert M. Levy for Plaintiff and Appellant.

The Law Office of Jay M. Vogel and Jay M. Vogel for Defendant and Respondent.

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Appellant appeals an order vacating respondent's default, setting aside the default judgment and granting respondent leave to defend this action, under the mandatory provisions of Code of Civil Procedure section 473, subdivision (b).[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant filed a complaint for breach of contract and quiet title against respondent on March 25, 2002. Appellant attached a written agreement signed by respondent in which respondent stated she did not wish to seek recourse or claim equity and would "forfeit all claims" in a certain condominium located on Peachgrove Street in North Hollywood, California (the property). Appellant alleged that respondent agreed to remove her name from the title to the property but failed to do so. Appellant asked for specific performance to remove respondent's name from the title and for incidental and consequential damages resulting from the breach of contract.

On July 17, 2002, appellant served respondent with a copy of the summons and complaint by substituted service by leaving a copy with the security guard at respondent's place of employment and thereafter mailing a copy to that address. Respondent did not answer the complaint or appear in the action, and the clerk entered respondent's default on November 8, 2002.

A prove-up hearing took place on March 12, 2003, and the court found appellant to be the sole owner of the property after hearing her testimony. The court ordered appellant to prepare and submit a default judgment for signature. On March 24, 2003, the court entered a default judgment against respondent and awarded appellant title to the property. Subsequently, on May 12, 2003, the court ordered the clerk of the court to execute an

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[1] Code of Civil Procedure section 473, subdivision (b) (hereafter section 473(b)) provides in pertinent part, "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

original grant deed naming respondent as grantor and appellant as grantee, as her sole and separate property.

On September 24, 2003, respondent filed a motion requesting the court to vacate her default, set aside the default judgment and grant her leave to defend the action under section 473(b).

In support of her motion, respondent provided the declaration of her counsel, Jay M. Vogel, stating the following. Respondent retained Vogel to represent her in the underlying real property matter from which the action derives on May 29, 2002. On or about July 23, 2002, respondent received a copy of the summons and complaint through the interoffice mail system at her company and retained Vogel to represent her interest in the action. Respondent informed Vogel that someone had tried to deliver the same documents to her on three prior occasions when she was not at work. Based upon erroneous legal research, Vogel mistakenly informed respondent that she had not been properly served in the action. He also mistakenly advised respondent that until she was properly served appellant could not obtain a default judgment against her.

Vogel declared that, in early March 2003, he searched the Los Angeles County title records and determined that title to the property remained in the names of both appellant and respondent. He also searched the superior court online case summaries and determined that, although appellant's counsel sought a default in early November 2002, as of early March 2003 the court had not entered any default judgment. Vogel again mistakenly advised respondent that until she was properly served appellant could not obtain a default judgment.

Vogel further declared he got in touch with appellant's counsel on September 22, 2003, and asked counsel to set aside the default judgment. Vogel stated he offered to pay appellant's reasonable attorney's fees and costs incurred in obtaining the default judgment, but appellant's counsel refused the offer.

Appellant opposed the motion for relief, and her counsel provided a declaration denying that respondent's counsel had offered to pay appellant's reasonable fees and costs.

On October 27, 2003, the court entered its order vacating respondent's default, setting aside the default judgment and granting respondent leave to defend the action,

provided that Vogel pay appellant's counsel $4,019.32 in costs and file an answer within 30 days.[2] Respondent filed an answer to the complaint on November 17, 2003. Appellant timely appealed from the court's order on December 24, 2003. (Code Civ. Proc., § 904.1, subd. (a)(2).)

DISCUSSION

Code of Civil Procedure section 473 has both discretionary and mandatory provisions for granting relief. Under the discretionary relief provision, upon a showing of "mistake, inadvertence, surprise, or excusable neglect," the court has discretion to allow relief from a "judgment, dismissal, order, or other proceeding taken against" a party or her counsel. Under the mandatory relief provision, upon a showing by an attorney's sworn declaration of "mistake, inadvertence, surprise, or neglect," the court shall vacate any "resulting default entered by the clerk" or a "default judgment or dismissal entered" against his or her client. (§ 473(b).) The range of attorney conduct for which relief can be granted under the mandatory provision is broader than that in the discretionary provision. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 615-616.)

In the present case, respondent's motion for relief from the entry of default and default judgment was based solely upon the mandatory provisions in section 473(b). Under the mandatory provision, the court is required to vacate a default, default judgment or dismissal entered against a party when that party's attorney swears in an affidavit the default or dismissal was "caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473(b); *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143, 145 ["default" refers to a default entered by the clerk or judge when a defendant fails to answer a complaint; "default judgment" refers to a judgment entered after the defendant has failed to answer the complaint and the defendant's default has been entered; "dismissal" has a limited

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[2] Appellant filed a notice of "non-compliance" on December 12, 2003, asserting the sum was not paid within 30 days of the court's ruling or notice of the ruling. Respondent asserts in her brief that the sum has been paid. Whether the sums have been paid is not material to the issues on appeal, since relief from default and default judgment is not conditional upon counsel's payment of compensatory legal fees, costs or monetary penalties. (Code Civ. Proc., § 473, subd. (c)(2).)

meaning "similar to the term 'default judgment'"].) The mandatory relief provisions "*require* the court to grant relief if the attorney admits neglect, even if the neglect was *inexcusable*." (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487 (*Metropolitan*); see also *Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 770 (*Vaccaro*).)

The only exception to mandatory relief is when the trial court determines that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect. (*Vaccaro*, *supra*, 63 Cal.App.4th at p. 770; *Metropolitan*, *supra*, 31 Cal.App.4th at p. 1487.)

Under this criteria, respondent's motion for relief satisfied the requirements of section 473(b). Respondent made an application for relief no more than six months after entry of judgment. The motion was accompanied by a declaration of fault by her counsel attesting to his mistake, inadvertence and neglect. The declaration of her counsel Vogel stated that, based upon erroneous legal research, he mistakenly informed respondent she had not been properly served in the action and also mistakenly informed her that appellant could not obtain a default judgment against her until such time as she was properly served. Although the declaration does not explicitly state it was the case, we will infer that counsel's oversight caused respondent's default. The evidence respondent presented was not refuted. The only evidence that appellant offered in opposition to the motion for relief consisted of her counsel's denial that Vogel ever offered to pay appellant's reasonable attorney's fees and costs if appellant would agree to set aside the default judgment. Under such circumstances, the trial court properly granted respondent relief from her default and default judgment under the mandatory provisions of section 473(b).[3]

On appeal, appellant argues that the mandatory relief provision is not really mandatory but rather only "the beginning of the analysis." Appellant suggests that the analysis must include whether counsel's mistake or inadvertence is excusable and

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[3] In granting the motion for relief, the court commented, "if the attorney[] files an affidavit of neglect, in essence, and says it's my fault, ponies up, I'm supposed to set it aside."

unintentional. However, her claim that relief is available under section 473(b) only for "excusable" mistakes is unavailing. As noted, under the mandatory relief provisions of section 473(b), the court must grant relief if the attorney admits neglect, even if the neglect was *inexcusable*. (*Metropolitan, supra,* 31 Cal.App.4th at p. 1487.)

Appellant relies on *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249 (*Zamora*), *Graham v. Beers* (1994) 30 Cal.App.4th 1656 (*Graham*) and *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674 (*Garcia*) to support her arguments. The cases are inapposite.

In *Zamora*, the trial court granted relief, and the Supreme Court affirmed, under the discretionary relief portion of section 473(b). (*Zamora*, *supra*, 28 Cal.4th at pp. 257-258.) Indeed, *Zamora* differentiated such discretionary relief from the mandatory relief provision of section 473(b) in noting the purpose of the mandatory provision "'was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.'" (*Zamora*, at p. 257.) While *Zamora* went on to discuss elements such as excusable mistake or inadvertence and diligence, that discussion was in the context of *discretionary*, not mandatory, relief. (*Id.* at pp. 258-259.)

Graham simply held that the mandatory language of section 473(b) does not apply to discretionary dismissal statutes. (*Graham*, *supra*, 30 Cal.App.4th at p. 1658.) In *Graham*, plaintiffs' counsel consciously disregarded his case and relegated it to the "back burner" in the mistaken belief the case would settle. (*Id.* at pp. 1659-1660.) The court dismissed the action under its discretionary power to dismiss for delay of prosecution. (Code Civ. Proc., § 583.410.) Plaintiffs moved for reconsideration and, after it was denied, moved for mandatory relief under section 473(b). The court held the Legislature "cannot have intended section 473 to be the perfect escape hatch from the dismissal statutes" when the case is dismissed for failure to prosecute. (*Graham*, at p. 1661.) The present situation is unlike *Graham* since respondent was not attempting to use section 473(b) to circumvent a court's discretionary dismissal or as a backdoor effort to obtain reconsideration.

Appellant's further reliance on *Garcia* is also misplaced. *Garcia* declined to apply the mandatory portion of section 473(b) to an attorney's failure to sufficiently oppose a

summary judgment motion, where there was "no complete failure to oppose, but rather an opposition which was, though apparently timely and procedurally adequate, inadequate in substance." (*Garcia*, *supra*, 58 Cal.App.4th at p. 683.) The court found there was no default, but only a motion lost on its merits, and section 473 did not apply. (*Garcia*, *supra*, at p. 683.) That is not the case here, where respondent completely lost her opportunity to defend because of her counsel's mistake.

Appellant asserts that the default in this case was the result of deliberate conduct by respondent and her counsel. Appellant argues respondent and her counsel engaged in "intentional" (boldface omitted) and "'sharp'" tactics, played "'close to the edge'" and employed "'hardball'" tactics in this proceeding, suggesting the entry of default and default judgment were the result of their own conscious actions in not responding to the complaint. These assertions are not supported by citations to the record and we may disregard them. (*Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560-1561; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283 [unsupported assertions bereft of factual underpinning or record references may be disregarded].) In any case, there is no evidence in the record that the default and default judgment were caused by anything other than respondent counsel's error in believing respondent had not been served and that no default judgment could be entered without proper service.

Appellant also argues that the request for relief was not made within a reasonable time because respondent and her counsel "knew" of the case for about a year but waited until six months after judgment to bring their motion. However, there is no requirement of diligence under section 473(b), and the motion is timely where, as here, it is brought within six months after entry of the default judgment. (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 868 ["section 473 no longer includes a requirement of diligence" and motion "brought within six months after entry of the default judgment" is timely]; *Metropolitan*, *supra*, 31 Cal.App.4th at p. 1487 [current version of § 473(b) "requires only that the application be made within six months after entry of judgment" with no requirement for diligence].)

Appellant urges that the discretionary rather than mandatory provisions of Code of Civil Procedure section 473 should apply to respondent's motion, in which case a motion for relief should have been made within six months of entry of default, not the entry of judgment. (See *Weiss v. Blumencranc* (1976) 61 Cal.App.3d 536, 541.) Respondent, however, clearly sought and the court granted relief under the mandatory provisions of section 473(b) rather than the discretionary provisions. The plain language of section 473(b) requires only that application for relief be made "no more than six months after entry of *judgment*" and allows for relief from a "default entered by the clerk" as well as a "resulting default judgment." (Italics added.) Respondent moved for relief six months to the day from the entry of judgment, and her motion accordingly was timely.

We note in conclusion that the purpose of the mandatory provision "is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits." (*Metropolitan*, *supra*, 31 Cal.App.4th at p. 1487.) The policy of the law also favors determinations on the merits rather than by default. (*Id.* at p. 1488.) These salutary purposes are achieved by the court's granting relief in this case.

DISPOSITION

The judgment is affirmed. Respondent is to recover her costs on appeal.

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FLIER, J.

We concur:

COOPER, P.J. RUBIN, J.